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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~471~~. 234 [illegible]

WILLIAM C. RAY, PLAINTIFF IN ERROR,

vs.

MURRAY F. SMITH.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

**FILED DECEMBER 4, 1871.**

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1 *Caption of term.*

United States of America, district court of the United States for the middle district of Alabama.

At a district court began and holden for said district, in the city of Montgomery, on the fourth Monday in May, it being the 24th day of the month, in the year of our Lord one thousand eight hundred and sixty-nine, and of the American independence the ninety-third year, the following proceedings were had.

Present, the Hon. Richard Busteed, judge, presiding.

*Summons & complaint.*

MURRAY F. SMITH
*versus*
WILLIAM C. RAY.

United States of America, district court of the United States for the middle district of Alabama.

The President of the United States to the marshal of said district, greeting:

You are hereby commanded to summon William C. Ray, who is a citizen of the State of Alabama, to be and appear before the honorable the judge of the said court at the place of holding said court, at Montgomery, on the 4th Monday of November, 1866, to answer the complaint of Murray F. Smith, who is a citizen of the State of New York, in a plea of trespass on the case upon promises, to the plaintiff's damage five thousand dollars. Herein fail not to have then and there this writ.

Witness the Hon'l Richard Busteed, judge of the said court, 4th Monday of May, in the year of our Lord one thousand eight hundred and sixty-six. Issued the 2d day of November, in the year of our Lord one thousand eight hundred and sixty-six.

Attest:
[SEAL.]

E. C. V. BLAKE,
*Clerk D. C. Middle District of Alabama,*
Per A. R. STORER, *Deputy.*

[Revenue stamps, 50 cents, cancelled.]

I acknowledge myself security for costs at the instance of the plaintiff in the above suit.

A. R. BELL.

United States of America, district court of the United States for the middle district of Alabama. Fall term, 1866.

Murray F. Smith, who is a citizen of the State of New York, by attorneys, complains of William C. Ray, who is a citizen of the State of Alabama, who has been summoned to answer a plea of trespass in the case upon promises:

*1st count.*

For that whereas heretofore, to wit, on the twelfth day of April, A. D.

2 1861, at, to wit, in the city of Montgomery, State of Alabama, and in the district aforesaid, one S. G. Hardaway made his two certain promissory notes in writing, bearing date a certain day and year therein mentioned, to wit, the same day and year aforesaid, and thereby then and there by one of said notes promised to pay to the order of said W. C. Ray, at the Bank of Mobile, eleven hundred and twenty-four & $\frac{50}{100}$ dollars, on the first day of March, A. D. 1862, after date thereof, and by the other of said notes promised to pay to the order of said W. C. Ray the further sum of eleven hundred and twenty-four & $\frac{50}{100}$ dollars, at the Bank of Mobile, on the first day of November, A. D. 1862, after date thereof; which said promissory notes afterwards, and before the payment of said sums of money therein specified, to wit, on the day and year aforesaid, at Montgomery aforesaid, and in the district aforesaid, had been and were delivered to the said W. C. Ray, who was then and there the bearer thereof, and entitled to the sums of money therein specified. And the said W. C. Ray, so being the bearer of said promissory notes, and entitled to the said sums of money therein specified, he, the said W. C. Ray, afterwards and before the payment of the said sums of money in the said notes specified, to wit, on the day and year aforesaid, at, to wit, Montgomery aforesaid, and in the district aforesaid, indorsed the said promissory notes, by which said endorsement he, the said W. C. Ray, then and there ordered and appointed the said sums of money in the said promissory notes specified to be paid to the said plaintiff, and then and there delivered the said promissory notes, so endorsed as aforesaid, to the said plaintiff. And the said plaintiff in fact saith that, afterwards, when the said notes respectively became due and payable according to the tenor and effect thereof, to wit, on the first day of March, A. D. 1862, and on the first day of November, A. D. 1862, respectively, as aforesaid, the said notes were presented at the said Bank of Mobile for payment thereof, and payment of said sums of money therein specified was then and there duly required according to the tenor and effect of the said promissory notes, but that neither the said Bank of Mobile, nor the said S. G. Hardaway, nor any person or persons on behalf of the said S. G. Hardaway, did or would at the said times, respectively, when the said promissory notes were presented and shown for payment thereof, as aforesaid, or at any time before or afterwards, pay the said sums of money therein specified, or any part thereof, but wholly neglected and refused so to do; of all which said several premises the said defendant afterwards, to wit, on the days and years last aforesaid, at, to wit, in the district aforesaid, had notice. By means whereof, and by force of the statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff the said several sums of money in the said promissory notes specified when he, the said defendant, should be thereunto afterwards requested. And being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, to wit, in the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said sums of money in the said promissory notes specified when he, the said defendant, should be thereunto afterwards requested.

*2nd count.*

And whereas the said S. G. Hardaway heretofore, to wit, on the twelfth day of April, A. D. 1861, at, to wit, Montgomery, in the said State of Alabama, and in the district aforesaid, made his two other cer-

tain promissory notes, in writing, bearing date a certain day
3 and year therein mentioned, to wit, the same day and year aforesaid, and thereby then and there, by one of his said notes, promised to pay to the said W. C. Ray, or order, at the Bank of Mobile, the sum of eleven hundred and twenty-four and $\frac{50}{100}$ dollars on the first day of March, A. D. 1862, after the date thereof, and by the other of said notes promised to pay to the said W. C. Ray, or order, the further sum of eleven hundred and twenty-four & $\frac{50}{100}$ dollars at the Bank of Mobile, on the first day of November, A. D. 1862, after date hereof, which said promissory notes afterwards, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at Montgomery aforesaid, and in the district aforesaid, had been and were delivered to the said W. C. Ray, who was then and there the bearer thereof, and entitled to the sums of money therein specified. And the said W. C. Ray so being the bearer of said promissory notes, and entitled to the said sums of money therein specified, he, the said W. C. Ray, afterwards, and before the payment of said sums of money in the said notes specified, to wit, on the day and year aforesaid, at, to wit, in the district aforesaid, endorsed the said promissory notes, by which said endorsement he, the said W. C. Ray, then and there ordered and appointed the said sums of money in the said promis'ory notes specified to be paid to the said plaintiff. and then and there delivered the said promissory notes, so endorsed as aforesaid, to the said plaintiff. And the said plaintiff, in fact, saith that, afterwards, to wit, when the said notes did become due and payable respectively, according to the tenor and effect thereof, to wit, on the first day of March, A. D. 1862, and on the first day of November, A. D. 1862, respectively, as aforesaid, the said notes were not presented and shown to the Bank of Mobile for payment thereof, for the following reasons, to wit: when the said promissory notes became due and payable respectively, according to the tenor and effect thereof, the said promissory notes were in the possession of the plaintiff, who, at the time the same were endorsed to him, resided, and from that time ever since has resided, and still resides, in the State of New York, one of the United States of America, then at war with the State of Alabama, one of the so-called Confederate States of America, where the said defendant then resided and still resides, and where said promissory notes were payable. And the said plaintiff avers that, within a reasonable time after the termination of the said war waged between the United States and the so-called Confederate States, to wit, on the first day of September, A. D. 1865, the said promissory notes were presented and shown for payment thereof to the said S. G. Hardaway, at the city of Montgomery, in the State of Alabama, and in the district aforesaid, and payment of said sums of money therein specified were then and there duly required according to the tenor and effect of the said promissory notes, but that neither the said S. G. Hardaway, nor any other person or persons on behalf of the said S. G. Hardaway, did or would at the said time when the said promissory notes were presented and shown for payment thereof, as aforesaid, or at any time before or afterwards, pay the said sums of money specified, or any part thereof, but wholly neglected and refused so to do. Of all which said several premises the said defendant afterwards, to wit, on the day and year last aforesaid, at, to wit, in the district aforesaid, had due notice. By means whereof, and by force of the statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff the said sums of money in the said promissory notes specified when he, the said defendant, should be thereunto

afterwards requested. And being so liable, he, the said defend-
4 ant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, to wit, the city of Montgomery, in the State of Alabama aforesaid, and in the district aforesaid, undertook, and then and there faithfully promised the said plaintiff, to pay him the said sums in the said promissory notes specified when he, the said defendant, should be thereunto after requested.

*3rd count.*

And whereas, also, the said defendant afterwards, to wit, on the day and year last aforesaid, was indebted to the said plaintiff in the further sum of five thousand dollars, lawful money, for money by the said plaintiff before that time lent and advanced to, and paid, laid out, and expended for, the said defendant, and at his like special instance and request.

*4th count.*

And also in the further sum of five thousand dollars for other money by the said defendant before that time had and received to and for the use of the said plaintiff. And, being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, undertook, and then and there faithfully promised the said plaintiff, to pay him the said several sums of money in this count mentioned when he, the said defendant, should be thereunto afterwards requested.

Yet the said defendant, though often requested the said sums of money to pay, hath hitherto failed so to do, but refused and still refuses to pay said sums of money, or any part thereof; wherefore the plaintiff sues and claims five thousand dollars damages.

J. A. ELMORE,
*Pl'ff's Attorney.*

I acknowledge myself, at the instance of the plaintiff, security.

Executed by serving copy upon W'm C. Ray, November 2nd, 1866.
JOHN HARDY, *Marshal.*

We, the jury, find for the plaintiff, and assess his damages at the sum of three thousand six hundred and twelve $\frac{00}{100}$ dollars.

D. H. SHULAR,
*As Foreman.*

District court of the United States for the middle district of Alabama.

MURRAY F. SMITH
*vs.*
WILLIAM C. RAY.

And the said plaintiff, by leave of the court first had and obtained, files the additional counts to the declaration in said cause, and thereupon says:

And whereas, also, the said defendant afterwards, to wit, on the day & year first aforesaid, at, to wit, in the district aforesaid, was indebted to the said plaintiff in the further sum of three thousand dollars for the work and labor, care and diligence, of the said plaintiff by the said plaintiff before that time done, performed, and bestowed in and about the business of the said defendant, and for the said defendant,
5 and at his special instance and request; and being so indebted, he, the said defendant, in consideration thereof, afterwards, to

wit, on the day and year last aforesaid, at, to wit, in the district aforesaid, undertook and faithfully promised the said plaintiff to pay him the said last-mentioned sum of money when he, the said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the day and year first aforesaid, at, to wit, in the district aforesaid, was indebted to the said plaintiff in the further sum of three thousand dollars for so much money by the said plaintiff before that time lent and advanced to the said defendant at his special instance & request; and, being so indebted, in consideration thereof afterwards, to wit, on the day and year last aforesaid, at, to wit, in the district aforesaid, undertook, then and there faithfully promised said plaintiff, to pay him the said last-mentioned sum of money when he, the said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the day and year first aforesaid, at, to wit, in the district aforesaid, was indebted to the said plaintiff in the further sum of three thousand dollars for so much money by the said plaintiff before that time paid, laid out, and expended to and for the use of said defendant at his like special instance and request; and being so indebted, afterwards, to wit, on the day and year last aforesaid, at, to wit, in the district aforesaid, he, the said defendant, undertook, and then and there faithfully promised said plaintiff, to pay him the said last-mentioned sum of money when he should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the day and year first aforesaid, at, to wit, in the district aforesaid, accounted with the said plaintiff of and concerning divers sums of money other than the above from the said defendant to the said plaintiff before that time due, and owing, and then in arrear and unpaid, and upon such accounting the said defendant was then and there found to be in arrear and indebted to the said plaintiff in the further sum of three thousand dollars; and being so found in arrear and indebted, he, the said defendant, undertook and then and there faithfully promised said plaintiff, to pay him the said last-mentiomed sum of money when he should be thereunto afterwards requested.

Nevertheless the said defendant, not regarding his said several promises and undertakings, hath not as yet paid the said several sums of money, or any or either of them, or any part thereof, to said plaintiff, although often requested so to do, but has hitherto wholly neglected and refused, and still doth and refuse, to pay the sum or any part thereof, to plaintiff's damage three thousand five hundred dollars; and thereupon he sues, &c.

J. A. ELMORE,
*Pl'ff's Att'ys.*

Filed May 29th, 1867.

E. C. V. BLAKE, *Clerk.*

District court of the United States for the middle district of Alabama.
May term, 1868.

MURRAY F. SMITH
*vs.*
WILLIAM C. RAY.

And now, at this term of the court, the plaintiff, by leave of the

court, files the following additional counts to the declaration in said cause:

6 And whereas, also, the said defendant afterwards, to wit, on the day and year aforesaid, at, to wit, in the district aforesaid, was indebted to the said plaintiff in the further sum of five thousand dollars for so much money by the said plaintiff before that time lent and advanced to the said defendant at his special instance and request; and also in the further sum of five thousand dollars for so much money by the said plaintiff before that time paid, laid out, and expended to and for the use of the said defendant, at his like special instance and request. And, being so indebted, the said defendant, in consideration thereof afterwards, to wit, on the day and year aforesaid, undertook, and then and there faithfully promised the said plaintiff, to pay him the aforesaid mentioned sums of money when he should be thereunto afterwards requested; yet, although often requested, the said sums of money, nor any part thereof, the said defendant hath not paid, but, or to do, has wholly failed and refused, and still doth fail and refuse, &c.

J. A. ELMORE,
*Pl'ff's Att'y.*

Additional counts filed by leave of the court May 25th, 1868.
E. C. V. BLAKE, *Clerk.*

In the district court of the United States for the middle district of Alabama. Fall term, 1866.

MURRAY F. SMITH
*vs.*
WILLIAM C. RAY.

The defendant, by his attorneys, Rice, Semple & Goldthwaite, says that the first count in the declaration is insufficient in law.

RICE, SEMPLE & GOLDTHWAITE, *Att'ys.*

They set down the following as grounds of demurrer:

1st. That the date of presentation of the notes for payment is not set out except under a "to wit," and is not stated positively.

2nd. Same as to statement of notice to defendant of non-payment; no protest is alleged, nor any excuse for want of protest.

R., S. & G.

The defendant also says that the second count of the declaration is insufficient in law.

RICE, SEMPLE & GOLDTHWAITE,
*Def't's Att'ys.*

He assigns the following as causes of demurrer to 2nd count:

1st. No sufficient excuse is stated for non-presentation of the notes before 1st September, 1865.

Overruled.

2nd. There is no positive allegation that they were ever presented on or before 1st September, 1865.

3rd. There is no positive allegation that they were ever presented to the maker.

4th. There is no sufficient excuse shown for failure to serve defendant notice before the 1st September, 1865, of non-payment.

5th. There is no allegation that he ever had notice of non-payment.
(The word "due" is inserted at folio 23 of the complaint, and this "5th cause" is then abandoned.

7 6th. It does not appear that he was notified of non-payment by the 1st September, 1865.

7th. It does not appear that notice on the 1st September, 1865, was reasonable in point of time. No protest or excuse for protest is stated.

RICE, SEMPLE & GOLDTHWAITE.

Filed in court Dec. 6th, 1866.

E. C. V. BLAKE, *Clerk.*

District court of the United States for the middle district of Alabama.
Fall term, 1866.

M. F. SMITH
*vs.*
W. C. RAY.

The said defendant, by his attorneys, comes and defends the wrong and injury, when, &c., and says that he did not undertake or promise in manner and form as the plaintiff hath complained thereof against him in the declaration; and of this he puts himself on the country, &c.

RICE, SEMPLE & GOLDTHWAITE,
*Def't's Att'y.*

Filed in court this 6th Dec. 1866.

E. C. V. BLAKE, *Clerk.*

*Deposition.*

Be it remembered that, on the seventh day of February, in the year one thousand eight hundred and sixty-seven, at the city of New York, in the county and State of New York, Murray F. Smith personally appeared before me, James H. Fay, a notary public duly appointed by the governor and senate of the State of New York, and commissioned under the great seal of said State, and made oath that he, said Murray F. Smith, was plaintiff in a suit then depending in the district court of the United States for the middle district of Alabama, wherein William C. Ray was defendant; that the testimony of him, said Murray F. Smith, was material and necessary for him, the said plaintiff, in the prosecution of such suit, and that he, the said Murray F. Smith, lived at New York City aforesaid, more than one hundred miles from Montgomery, Alabama, where the court at which he, the said plaintiff, expected the said cause would be tried was appointed by law to be held; that William C. Ray, the above-named defendant, resided at Montgomery aforesaid, about two thousand miles from New York City aforesaid; and that, as he, the said Murray F. Smith, was informed and believed, the attorneys for said William C. Ray, the defendant above named, resided at said Montgomery, about two thousand miles from New York City aforesaid. And the said Murray F. Smith requested me that he, the said Murray F. Smith, might be examined according to the directions of the acts of Congress in such case made and provided.

Whereupon I ordered that the said Murray F. Smith should be examined, de bene esse, before me at New York City; and the said Murray F. Smith appearing before me at said New York City, on this twentieth

day of February, A. D. 1867, I have, therefore, proceeded with the said examination.

And the said Murray F. Smith, being carefully examined and
8 cautioned and duly sworn to testify the whole truth and nothing but the truth, saith as follows:

I am plaintiff in the action above mentioned, which is brought to recover the amount of two promissory notes due me for eleven hundred and twenty-four $\frac{50}{100}$ dollars each; each made by S. G. Hardaway, and endorsed by the defendant, W. C. Ray; each dated April 12th, 1861, payable at Bank of Mobile, in Mobile, Alabama, one on the 1st of March, 1862, and the other on the 1st of November, 1862. Hardaway & Ray were partners in business in Montgomery, Alabama, and I was a commission merchant in Mobile at the times these notes were given. Hardaway, before he became the partner of Mr. Ray, had bought cotton for me on orders, in which I allowed him a half interest, no charge for services being made by either of us. He only bought under orders from me, and at my discretion, when I thought there was a profit between Montgomery and Mobile markets. As it was universally known, Mr. Hardaway was not able to respond to any losses which might be sustained. I never permitted him to buy cotton and speculate on his own account by drawing on me for the cost of the same. When Mr. Ray became his partner, as he, Ray, was considered entirely responsible, I did not hesitate to permit Hardaway & Ray, as partners, to draw on me for the payment of the cotton they bought on speculation and shipped me. And in such speculations they became in debt to me for money paid for them over five thousand dollars.

In April, 1860, Mr. Ray remitted me at Mobile over $2,500, which was credited to the account of Hardaway, and they and he was so informed by me on the 30th of April, 1860. There were some other credits allowed on this account and payments by Mr. Hardaway previous to the 12th of April, 1861, when the balance due was closed by my taking the two notes on which this action is founded; and the account was so closed at the request of Mr. Ray, who did not claim that he was released, but said he wished it in this form, as he could get Mr. Hardaway to secure him when the notes fell due, and I agreed to this manner of closing the account, because Fort Sumpter was, at the moment, being bombarded, and I did not wish to have an open account to prove by witnesses who might be all killed in the war. I have never, in any way, agreed to release Mr. Ray from his liability on this debt, nor did he ever contend that the part payment by him released him, as the debt never would have been contracted but for his responsibility.

When these notes fell due I was not in the South, and the proclamation of the President of the United States forbidding all intercourse with the States then in rebellion prevented my going or sending these notes to Mobile for payment or protest. In 1865, so soon after the cessation of hostilities as travel and communication became safe and practicable between New York and Montgomery, on the 24th of August, I sent these notes to Mr. John Whiting, of Montgomery, to demand payment for me, but have not as yet received payment of them or any part thereof.

MURRAY F. SMITH.

And I do further certify that the preceding deposition was reduced to writing by me, and signed by the said Murray F. Smith, and that I am not of counsel or attorney for either of the parties to the said suit, nor am I interested in the event thereof.

JAMES H. FAY,
*Notary Public, New York County.*

(Notarial seal attached.)

9 Addressed: To H. C. V. Blake, esq., clerk of the U. S. district court, middle dist. of Alabama, Montgomery, Alabama.
Post marked: New York, Feb. 21.
(Two 3-cent postage stamps, cancelled.)

U. S. district court, middle district of Alabama.

MURRAY F. SMITH
*vs.*
WILLIAM C. RAY. } 1024.

Deposition of M. F. Smith: This deposition taken, sealed up, and deposited in the U. S. post-office in the city of New York, on the 21st day of February, 1867, by me.

JAMES H. FAY,
*Notary Public, N. Y. Ct.*

(James H. Fay, notary public, New York City.)

Received in clerk's office Febr'y 26th, 1867.
E. C. V. BLAKE, *Clerk.*

Published by order of court 25th May, 1868.
E. C. V. BLAKE, *Clerk.*

*Judgment entry.*

MURRAY F. SMITH
*vs.*
W'M C. RAY. } No. 1024.

MAY 27TH, 1869.

This day came the parties, by attorney, and thereupon came a jury of twelve good and lawful men, to wit, D. H. Shular and eleven others, who, being elected, tried, and sworn well and truly to try the issues joined between the parties, upon their oaths do say they find for the plaintiff, and assess his damages at the sum of three thousand six hundred and twelve $\frac{70}{100}$ dollars. It is therefore considered by the court that said plaintiff recover of said defendant the sum of three thousand six hundred and twelve $\frac{70}{100}$ dollars, the damages ass'ed by the jury aforesaid, and also the costs in this behalf expended; for all of which execution may issue.

*Denial of new trial.*

MURRAY F. SMITH
*vs.*
W'M C. RAY. } No. 1024.

JUNE 23RD, 1869.

This day comes the defendant, by attorney, and suggests to the court that wrong and injury have been done him in the judgment heretofore rendered in this case, to wit, on the 27th day of May, 1869, and thereupon moves the court that said judgment be set aside, and declared of

none effect in law, and the cause restored for trial to its original place upon the docket; which motion was overruled, and new trial denied.

10 *Affidavit for new trial.*

United States district court for the middle district of Alabama.

MURRAY F. SMITH
*vs.*
W'M C. RAY.

The principle settled as long ago as 1770, by the court of king's bench, is decisive in favor of the present application for a new trial. In Martyn v. Podger and others, (5 Burrow's, Rep., 2631,) the defendants, who were sued in trespass for seizing goods and chattels of the pl'ff, justified under a fi. fa.; they did not, on the trial, produce or prove a copy of the judgment upon which the fi. fa. was grounded, for want whereof a verdict, upon the trial, was found for the plaintiff, subject to the opinion of the court upon the question whether it was necessary to their defence that they should have produce' a copy of the judgment. The court of king's bench unanimously this question (which was the only question referred to it) against the defendants; but at the close of its opinion on that question added these significant words, to wit: "They thought, therefore, that the defendants might be at liberty to move for a new trial." Their attorney accordingly moved for a new trial, and the whole court, through Lord Mansfield, granted a new trial, thus stating the reason thereof: "The copy of the judgment ought to have been produced, but the verdict arises from a slip and inadvertance; it is against law and justice; the plaintiff has no merits; * * the recovery is manifestly contrary to reason and justice." Many other of the most eminent judges of modern times have unhesitatingly yielded their assent to this decisive control of justice over application for new trials, and disregarded petty or technical considerations, which, however much to be regarded in pleas of abatement, have no place in an application to the enlightened discretion of a court for a new trial. Evidently no technical rules ought to control applications to the discretion of courts; the paramount consideration is attaining the justice of the case. (Nichols v. Aslop, 10 Louisiana Rep., 409, re-affirmed in Holmes v. Steamer Chieftan, 1 Louisiana Annual Rep., 136; Thompson v. Clendening, 1 Head's (Tennessee) Rep., 287; Arthur v. Mitchell, 10 Smedes & Marsh, 326; Rolfe v. Rolfe, 10 Georgia R., 143.) The cases in support of this position are too numerous to be cited in this brief. It is firmly settled that when, in the progress of a trial, the cause suffers injustice from the honest mistakes of the party or his counsel, or a witness, a new trial ought to be granted. A leading case in this is D'Aguilar v. Tobin, (4 Sergeant & Louber's Rep., top page 363;) Wilson v. Brandon, (Georgia R., 136;) Rolfe v. Rolfe, (10 Georgia R., 143.) Our law is too rational to assume that men are free from liability to mistake, surprise, or forgetfulness; and it is to' just to deny relief for injury resulting from these common infirmities. The decisions to the contrary found in the books are not sound law, but disfigurations of the law. The law, in its aim to attain the justice of the case, is very discriminating; thus it holds that the means of knowledge is not per se knowledge; and that, although a party may have once known a fact, yet, if subsequently he had really forgotten it, and acted under this forgetfulness, this for-

getfulness shall not prejudice him. (Kelly v. Salari; 9 Meeson & Welsby, 58; Rutherford vs. McIver, 21 Ala. R. 750.) This application for new trial has for its foundations, reason, law, and justice.

11 *Motion for new trial.—Rice for motion, Elmore contra.*

MURRAY F. SMITH
*vs.*
WILLIAM C. RAY.

The motion is based upon the ground of surprise *surprise* on the part of the defendant, not on that of his counsel; that testimony about his having received funds from Hardaway was introduced testimony that was elicited from Hardaway, and well known to Ray. No testimony as to any new fact is shown in the affidavits, but only cumulative testimony as to *to* the facts proved in the trial; and it is settled that cumulative testimony is no ground for a new trial. The affidavits contradict what both Hardaway & Ray swore on the trial. They both swore that before the maturity of the notes Ray had funds of Hardaway's in hands to a sufficient amount to pay both notes, which Ray was instructed by Hardaway to apply to their payment; but after the maturity of the notes, not being able to find them, Ray paid out these funds on other debts of Hardaway's by Hardaway's instruction. They now say in these affidavits that the only authority Ray had to apply these funds was that of a partner, which is in fact none whatever; and that Hardaway checked thereon, *out* these funds were partnership funds, standing to the credit of the partnership in bank. And Ray, without the direction of Hardaway, could not have applied a dollar of them to these notes unless these notes were the debts of that partnership. Ray says he was ignorant that the possession of funds by him to pay these notes, under Hardaway's instructions, had any bearing upon the case until the judge charged the jury. He was present in court; heard Hardaway swear about them; heard his counsel cross-examine on this point; was put up himself and examined on them, and cross-examined. Then heard plaintiff's counsel place the case precisely on this ground, and his counsel was called upon by the presiding judge to reply. How can he plead his ignorance or surprise? If he was ignorant of the law, that is no excuse; but his counsel can't plead that. There is no affidavit of defendant's counsel of any surprise on his part. As to the funds being confederate money, that was known then as well as now. Judge Rice knew that in 1862 there was no currency in circulation here but confed. notes. This application is to the discretion of the court; to the conscience of the court. If ex equo et bono, the plaintiff ought to have his money. The court will not do anything to deprive him of the advantage he has fairly attained by a verdict. This was originally the joint debt of H. & R., for all of which Ray was bound, and the settlement that was made ought not to discharge Ray. The payment of part of a debt is not a satisfaction of the whole, although there is an express agreement to that effect, and although a note be given.

Cumber vs. Wagner, 1 Strange, 426.

Fitch vs. Sutton, 5 East, 230.

Sibne vs. Tripp, 15 Mee. & Welsby, 23.

See whole doctrine on this subject in Smith's Leading Cases, vol. 1, pt. 1, 549.

J. A. ELMORE.

12 United district court for the middle district of Alabama.

MURRAY F. SMITH
*vs.*
WILLIAM C. RAY.

The defendant, on oath, states that, at the time he endorsed the two notes executed by Samuel G. Hardaway, which were read in evidence on the trial of this cause at the present term of said court, he had no funds or property of said Hardaway wherewith to pay said notes; that the only funds or property in which said Hardaway had any interest or pretence of interest, which afterwards came into defendant's hands, were treasury notes issued by the Confederate States of America during the late war between said Confederate States and the United States, which treasury notes came into defendant's hands as proceeds of the business of cotton brokers conducted in Montgomery, Alabama, by defendant alone, in the name of S. G. Hardaway & Co., during the absence of said Hardaway from Montgomery as a soldier and officer in the army of the Confederate States during said war; that the interest of said Hardaway in said business, so conducted by said defendant during said absence of said Hardaway, was, by the assent of defendant, and understanding between them, that of an equal partner with defendant, said Hardaway and defendant being the only partners in that business whilst conducted as aforesaid; that there was no direction given by said Hardaway to defendant, or special authority conferred by him upon defendant to apply the said interest of said Hardaway in said business, or the proceeds thereof, or any part of the same, to the payment of the said two notes, or either of them, or to hold the said interest of said Hardaway, or the proceeds thereof, or any part of the same, as indemnity for the defendant's indorsement of said two notes; that the authority the defendant had over said Hardaway's interest in the proceeds of said business, which proceeds consisted entirely of confederate treasury notes, was no more than such authority as defendant had as a partner; that, when said Hardaway returned from the military service in the fall of 1862, defendant informed him that there was a certain sum to credit of S. G. Hardaway & Co. in bank in Confederate States treasury notes, the profits of said partnership, and said Hardaway drew out one half of said sum by checks drawn by him in the name of S. G Hardaway & Co., for his own use; and that at that time the said treasury notes had greatly depreciated in value, and were constantly and steadily depreciating in value, and the interest of Hardaway therein had really become wholly insufficient in value to amount to indemnity against defendant's endorsement of said two notes; and that said treasury notes continued afterwards to depreciate until at the close of said war they had become valueless, and have ever since continued valueless. The defendant further states that he was ignorant that the aforementioned matters, as to said partnership business with Hardaway, and the receiving by defendant of the said treasury notes as the proceeds of said business, as above mentioned, had any connection or bearing upon this cause, or the result of it, until after the charge of the presiding judge had been given to the jury, and, therefore, had never informed his counsel of the foregoing facts relating thereto until after the trial; that the defendant was completely surprised that said receipt by him of said interest of Hardaway in said business was ever introduced on the trial; and but for the aforementioned ignorance and surprise the

defendant could and would have proved on the trial the several facts herein above stated.

WILLIAM C. RAY.

13 U. S. OF AMERICA, *Mid. Dist. of Ala.:*

Before me this 31st May, 1869, came W. C. Ray, who, being duly sworn according to law, deposes and says the foregoing statement is true.

GEORGE H. PATRICK,
*U. S. Commissioner.*

United States district court for the middle district of Alabama.

MURRAY F. SMITH
*vs.*
WILLIAM C. RAY.

Sam'l G. Hardaway states on oath that he has read the accompanying affidavit of defendant, and that in all respects it is correct in substance; that the only respect whatever in which the statements therein contained need the slightest alteration to make them perfectly accurate is in this, to wit, that the authority of said defendant to apply the funds referred to in his said affidavit to the payment of said two notes at their maturity was no more than the authority of def't as an equal partner with affiant, and such authority as the intimate and confidential relations which had long existed between them might justify def't in assuming upon the then existing state of facts; and this is really the authority, and the whole of the authority, which affiant referred to in his testimony on the trial, which testimony on this point was given under surprise, and without time to recall to his mind the facts as they really are. Affiant states explicitly that he never did, by words, either written or spoken, direct or empower said def't to apply said funds to said two notes; that there was nothing of that kind passed between him and defendant, and, if he had not been taken on surprise in this respect, on the trial he would have testified to the facts as he herein states he knows them to be.

S. G. HARDAWAY.

U. S. AMERICA, *Mid. Dist. of Ala.:*

Before me, this 31st May, 1869, came S. G. Hardaway, who, being duly sworn, says that the foregoing statement is true.

GEO. H. PATRICK,
*U. S. Commissioner.*

Motion for a new trial denied June 23rd, 1869.

RICHARD BUSTEED,
*Judge, &c.*

Filed June 22d, '69.

E. C. V. BLAKE, *Clk.*

*Bill of exceptions.*

District court of the United States for the middle district of Alabama, May term, A. D. 1869.

MURRAY F. SMITH
*vs.*
WILLIAM C. RAY.

Be it rem'bered that, on this the fourth day of said term of said

court, this cause was called for trial. Before either party had
14 announced himself ready for trial, the defendant moved the court to suppress the deposition of the plaintiff, which purported to have been taken by James H. Fay, a notary public in New York, and which was on file in this court, and which the plaintiff had avowed his intentions to use as evidence on the trial of this cause. The grounds of said motion were the following:

1st. That said deposition was not taken in accordance with the law of the land.

2nd. That it was not directed to this court according to law.

3rd. That it was not opened in court.

4th. That the certificate accompanying said deposition was not in compliance with law.

5th. That said deposition was not taken, certified, directed, and opened as the law of the land requires, in relation to a deposition taken without notice or commission, as said deposition was. On the hearing of said motion, the said deposition and caption and certificate thereto, as well as all the endorsements, directions, and entries on said deposition, or on the envelope thereof, were shown to the court, and are made part of this bill of exceptions, and are as follows, to wit:

*Deposition.*

Be it remembered that, on the seventh day of February, in the year one thousand eight hundred and sixty-seven, at the city of New York, in the county and State of New York, Murray F. Smith personally appeared before me, James H. Fay, a notary public duly appointed by the governor and senate of the State of New York, and commissioned under the great seal of said State, and made oath that he, said Murray F. Smith, was plaintiff in a suit then depending in the district court of the United States for the middle district of Alabama, wherein William C. Ray was defendant; that the testimony of him, said Murray F. Smith, was material and necessary for him, the said plaintiff, in the prosecution of such suit, and that he, the said Murray F. Smith, lived at New York City aforesaid, more than one hundred miles from Montgomery, Alabama, where the court at which he, the said plaintiff, expected the cause would be tried, was appointed by law to be held; that William C. Ray, the above-named defendant, resided at Montgomery aforesaid, about two thousand miles from New York City aforesaid; and that as he, the said Henry F. Smith, was informed and believed, the attorneys for said William C. Ray, the defendant above-named aforesaid, resided at said Montgomery, about two thousand miles from New York City aforesaid.

And the said Murray F. Smith requested me that he, the said Murray F. Smith, might be examined according to the directions of the act of Congress in such case made and provided. Whereupon I ordered that the said Murray F. Smith should be examined, de bene esse, before me at New York City, and the said Murray F. Smith appearing before me at said New York City on this twentieth day of February, A. D. 1867, I have therefore proceeded with the said examination.

And the said Murray F. Smith, being carefully examined and cautioned, and duly sworn to testify the whole truth, and nothing but the truth, saith as follows:

I am plaintiff in the action above mentioned, which is brought to recover the amount of two promissory notes due me for eleven hundred and twenty-four $\frac{50}{100}$ dollars each; each made by S. G. Hardaway and

endorsed by the defendant W. C. Ray; each dated April 12th 1861,
15 payable at Bank of Mobile in Mobile, Alabama, one on the 1st of March, 1862, and the other one the 1st of November, 1862. Hardaway & Ray were partners in business in Montgomery, Alabama, and I was a commission merchant in Mobile at the time these notes were given. Hardaway, before he became the partner of Mr. Ray, had bought cotton for me on orders in which I allowed him a half interest, no charge for services being made by either of us; he only bought under orders from me and at my discretion, when I thought there was a profit between Montgomery and Mobile markets. As it was universally known Mr. Hardaway was not able to respond to any losses which might be sustained, I never permitted him to buy cotton and speculate on his own account by drawing on me for the cost of the same. When Mr. Ray became his partner, as he, Ray, was considered entirely responsible, I did not hesitate to permit Hardaway and Ray, as partners, to draw on me for the payment of the cotton they bought on speculation and shipped me, and in such speculation they became in debt to me for money paid for them over five thousand dollars.

In April, 1860, Mr. Ray remitted me at Mobile over $2,500, which was credited to the account of Hardaway & Ray, and he was so informed by me on the 30th of April, 1860. There were some other credits allowed on this account, and payments by Mr. Hardaway previous to the 12th of April, 1861, when the balance due was closed by my taking the two notes on which this action is founded; and the account was so closed at the request of Mr. Ray, who did not claim that he was released, but said he wished it in this form, as he could get Mr. Hardaway to secure him when the notes fell due. And I agreed to this manner of closing the account, because Fort Sumpter was at the moment being bombarded, and I did not wish to have an open account to prove by witness who might be all killed in the war. I have never in any way agreed to release Mr. Ray from his liability on this debt, nor did he ever contend that the part payment by him released him, as the debt never would have been contracted but for his responsibility. When these notes fell due I was not in the South, and the proclamation of the President of the United States forbidding all intercourse with the States then in rebellion prevented my going or sending these notes to Mobile for payment or protest. In 1865, so soon after the cessation of hostilities as travel and communication became safe and practicable between New York and Montgomery, on the 24th of August, I sent these notes to Mr. John Whiting of Montgomery, to demand payment for me, but have not as yet received payment of them or any part thereof.

MURRAY F. SMITH.

And I do further certify that the preceding deposition was reduced to writing by me and signed by the said Murray F. Smith, and that I am not of counsel or attorney for either of the parties to the said suit, nor am I interested in the event thereof.

JAMES H. FAY,
*Notary Public New York County.*

(Seal attached.)

Addressed to E. C. V. Blake, esq., clerk of the U. S. district court middle district of Alabama, Montgomery, Alabama. Post marked: New York, Feb. 21.

(Two 3-cent postage stamps, cancelled.)

16 U. S. district court, middle district of Alabama.

MURRAY F. SMITH
*vs.* } 1024.
WILLIAM C. RAY.

Deposition of M. F. Smith; This deposition taken, sealed up, and deposited in the U. S. post office in the city of New York, on the 21st day of February, 1867, by me.

JAMES H. FAY,
*Notary Public N. Y. Ct.*

(James H. Fay, notary public New York City.)

Received in clerk's office Feb'ry 26th, 1867.
E. C. V. BLAKE, *Clerk.*

Published by order of court 25th May, 1868.
E. C. V. BLAKE, *Clerk.*

And it was admitted by the parties that said deposition had been taken without any notice to the defendant and without any commission, and that defendant and his attorneys resided two thousand miles from New York, and were at their own residence when said deposition was taken. This was all the evidence adduced on the hearing of said motion; and upon the foregoing evidence, without anything else, the court overruled the said motion and refused to suppress said deposition; and to each of said rulings and decisions of the court the defendant duly excepted.

The defendant had filed his demurrer to the first count of the declaration, and his demurrer to the second count of the declaration; the plaintiff joined in said several demurrers, and the court overruled each of said demurrers, the said demurrers being on file. To these several rulings and decisions the defendant duly excepted.

The defendant then duly filed the plea of the general issue to each and every count of said declaration, and the plaintiff joined issue thereon; and then a jury was empannelled and sworn to try the issues so joined. On the trial the plaintiff read in evidence two promissory notes, which two notes are described in the first count of the declaration, and are also described in the second count of the declaration. The plaintiff then introduced Samuel G. Hardaway as a witness, who testified that he made said two notes on the day they bear date—that is, on the 12th day of April, 1861—in the city of Montgomery, in the State of Alabama; that, prior to that day, he and the defendant, as partners in cotton speculation, had bought a number of bales of cotton in Montgomery and shipped them to plaintiff, then a factor and commission merchant in Mobile, Alabama, for sale by the plaintiff, as such factor and commission merchant; that, before the sale, the plaintiff had advanced them a considerable sum on said cotton; that, on the sale of said cotton, the loss thereon turned out to be something over four thousand dollars, whereby they became indebted to the plaintiff in the sum of over four thousand dollars; that, after this sale, and on the day said notes were given, the plaintiff came to Montgomery, Alabama, with the account-current between him & Hardaway and defendant, and called on said Hardaway & defendant for a settlement of this indebtedness; that the plaintiff, the defendant, and said Hardaway, all being together on said last-mentioned day, the defendant told plaintiff that if the account

could be settled, and he (said Ray) relieved, he (said Ray)
17 would pay his half of said indebtedness in cash to plaintiff, and that he desired that done; that, thereupon, said Hardaway told plaintiff that he (Hardaway) had not on hand the cash to pay down his (Hardaway's) half of said indebtedness.

And, thereupon, plaintiff agreed to take from Hardaway the two notes above mentioned, and read in evidence by plaintiff, for his (Hardaway's) half of said indebtedness, if said Ray or any other solvent man would endorse said notes. And, thereupon, plaintiff accepted and received from defendant his (defendant's) half of said indebtedness in cash, and from Hardaway the said two notes endorsed by defendant for Hardaway's half of said indebtedness, and receipted and delivered up the account showing said indebtedness of Hardaway and defendant to the plaintiff. Hardaway further testified that, at the time said two notes were executed, there was no other indebtedness of Hardaway & Ray, or or either of them, to the plaintiff, than the said indebtedness of something over four thousand dollars, resulting from loss on said cotton, as aforesaid, and there was no other consideration for said two notes than is disclosed in the foregoing testimony of said Hardaway, and that said plaintiff received said two notes in payment of his (Hardaway's) half of said joint indebtedness to plaintiff at the same time that he received from defendant the defendant's half of said indebtedness in cash, and receipted and delivered up the account showing said joint indebtedness. Hardaway further testified that he did not recol'ect when mails were re-established between New York and Montgomery and Mobile, but he knew that all impediments or obstructions to the passage of persons from Montgomery to New York, and from New York to Montgomery and to Mobile, or to any other part of Alabama, and from Mobile to Montgomery, were removed and ended from May, 1865, up to this time; that there had been nothing since May, 1865, to prevent persons from coming from any part of the State of New York or other Northern State to any part of the State of Alabama, and that neither of said two notes had ever been presented to him (said Hardaway) for payment, until the spring of 1866, when both of them were presented to him in the city of Montgomery for payment by Mr. John Whiting, who is now dead, and that, at the date of said notes, he (said Hardaway) and said defendant were and ever since had been resident citizens of said city of Montgomery, Alabama, and known to be so by the plaintiff, who was a resident citizen of the State of New York, and had resided in New York from the time the notes were given.

The plaintiff offerred to prove, by said Hardaway, that the defendant had funds of said Hardaway in his hands to pay said notes prior to their maturity. The defendant objected to the evidence thus offered on the ground that it was illegal, and also on the ground that it was irrelevant; but the court overruled the objection of defendant, and permitted said Hardaway to testify that the defendant had funds of said Hardaway in his hands to pay said notes prior to their maturity. And to each of these rulings and decisions of the court the defendant duly excepted. Then, upon cross-examination, Hardaway testified that, when the said notes were given and endorsed, as above shown, the defendant had nothing in his hands belonging to Hardaway, but that afterwards, and before the maturity of either of said notes, Hardaway & Ray were engaged as partners in the business of cotton brokerage, and, while so engaged, Hardaway went to the army of the Confederate States, and it
was arranged between them at the time he was going into the
18 army, that, during his (Hardaway's) absence in the army, Hard-

away should continue to share equally with defendant in the said business of buying and selling cotton for other persons, which business was called cotton-brokerage, and was to be conducted by defendant during Hardaway's absence in said army, and that, by this arrangement and this business, the share of said Hardaway from said business and its profits amounted to a sum larger than the amounts of said notes, at a period earlier than the maturity of said notes, and this share was in the defendant's hands until after the maturity of said notes, and the defendant was authorized to apply the same to the payment of said notes at their maturity, but that defendant could not find the notes at their maturity, nor did he ever see them after they were made until the spring of 1866, and that, not being able to find the notes, as aforesaid, Hardaway, before the notes were presented to him in the spring of 1866, but after their maturity, instructed the defendant to apply the said amount, resulting from his said share in said cotton-brokerage business, as aforesaid, to debts due by Hardaway to other persons, and the defendant yielded to and obeyed said instruction. The said amount resulting from the said share in said business, as aforesaid, was the only funds he (Hardaway) had in defendant's hands at any time since the execution of said two notes. At this stage of the evidence, and whilst said Hardaway was regularly under cross-examination, the defendant propounded to him the following question:

"If these notes had been presented to you within 30 days after all obstructions personal to communication between New York and Montgomery were removed in the summer of 1865, would you have had means to pay them, and are you not now unable to pay them, and have you not lost the means you then had by speculation since?"

The plaintiff's attorney objected to this question, and thereupon the defendant's attorney, for the purpose of showing the relevancy of the matter he expected to elicit as an answer to said question, and the connection in which and the purpose for which he proposed to introduce said matter, offered to state to the court said matter, and certain other facts which he expected to prove in the course of the trial in connection with said matters; but the court refused to permit the defendant's counsel to make any such statement to the court, and also refused to permit any answer to be made to said question; and to each of said refusals and rulings of the court the defendant duly excepted. The only notes shown by pl'ff's counsel to Hardaway on his examination were the two notes sued upon.

The defendant then separately and successively propounded to said witness the following questions:

"If the notes just shown you by the plaintiff's counsel had been presented to you for payment within thirty days after the removal of all impediments to the passage of persons from Montgomery, Alabama, to the city of New York, and from New York to Montgomery, in the summer of 1865, did you then have the means of paying them, and the ability to pay them? If the notes just shown you by plaintiff's counsel had been presented to you for payment within thirty days after the removal of all impediments to the passage of persons from Mobile, Alabama, to the city of New York, and from New York to Mobile, in the summer of 1865, did you then have the means of paying them, and the ability to pay them? Have you, since the fall of 1865, and since the expiration of more than sixty days after the removal of all impediments to the passage of persons from Montgomery and Mobile, Alabama, to the city of New York, and from New York to Montgomery and Mobile, in the summer of 1865, lost the means and the ability to pay the notes just shown

19 to you by plaintiff's counsel, and introduced in evidence by him?"

On objection by plaintiff's counsel, the court separately and successively refused to allow any answer to be made to any of said questions, or any part thereof; and to each of said refusals and rulings of the court the defendant duly excepted.

The plaintiff's counsel then read in evidence to the jury the deposition of the plaintiff, which the defendant had moved to suppress, as above shown, and which is hereinabove set forth.

The defendant introduced P. T. Sayre and several other witnesses, who testified in substance that there was no impediment or obstruction to personal travel from New York to Montgomery or Mobile, or from Mobile or Montgomery to New York, or from Montgomery to Mobile, in July, 1865, or since that time. It was admitted by the plaintiff that said two notes had never been presented at the Bank of Mobile, and had never been in or at said bank; and that the November term, 1865, of this court was held in the city of Montgomery, Alabama.

The defendant was sworn as a witness in his own behalf, and testified in substance the same as the witness Hardaway testified on all the matters embraced in the foregoing testimony of said Hardaway. The defendant further testified that no notice of the presentment of said notes, or either of them, was ever given to him until the last of June or July, 1866, when such notice was for the first time given by said John Whiting, who has since died.

The foregoing was all the evidence adduced on the trial of this cause, and upon the foregoing evidence—

The court gave to the jury the following charge:

"If there were no evidence in this case that the maker of the notes in suit had provided the endorser with funds to discharge them at maturity, then the question whether the notes were legally presented for payment, and the question whether legal notice of protest was given to the endorser, would have had to be submitted to the jury. The evidence on this point is that Ray was provided by Hardaway with the means of indemnifying himself against his endorsement. He need not have parted with these means until the notes were paid and in his possession. He choose to do so, however, and cannot now complain of the want of demand on the maker, or notice of protest to himself. I therefore direct your verdict for the plaintiff for $1,124.50, with interest thereon from the 4th March, 1862, at 8%, and for $1,124.50, with interest thereon from the 4th November, 1862."

To the charge of the court thus given to the jury, and to each part thereof, the defendant excepted, and offered to state to the court the grounds of said exceptions to said charge, and to each part thereof, and the matters of law respectively on account of which he so excepted; but the court refused to allow any such statement, and to this the defendant excepted.

The jury then retired to make up their verdict under the direction of the court under the aforesaid charge.

And this is presented as the defendant's bill of exceptions, and allowed and signed and sealed as such by the court, the Honorable Richard Busteed presiding and constituting the court, this 27th day of May, A. D. 1869.

[SEAL.] RICHARD BUSTEED,
*Judge, &c.*

We, the counsel and attorneys of the respective parties in the
20 above-entitled cause, agree upon the foregoing bill of exceptions in

said cause, and that the same may be signed by the presiding judge as such.

GOLDTHWAITE, RICE AND SEMPLE,
*Atty's for the Defendant.*
J. A. ELMORE, *for Pl'ff.*

Filed June 23rd, 1869.

E. C. V. BLAKE, *Clerk.*

*Bond for appeal.*

Supreme court of the United States.

MURRAY F. SMITH
*vs.*
WILLIAM C. RAY.

Know all men by these presents that we, William C. Ray, George B. Holmes, and Albert Strassburger, are held and firmly bound unto Murray F. Smith in the sum of seventy-five hundred dollars, to be paid to the said Mnrray F. Smith, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this the fourth day of June, anno Domini 1869.

Whereas the above-named William C. Ray hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgments rendered in the above-entitled suit by the district court of the United States for the middle district of Alabama:

Now, therefore, the condition of the above obligation is such, that if the above-named William C. Ray shall prosecute his said writ of error to effect, and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WILLIAM C. RAY.
GEO. B. HOLMES.
ALBERT STRASSBURGER.

Sealed and delivered in presence of—

I approve of the foregoing bond as to its form and sufficiency, June 4th, 1869.

RICHARD BUSTEED,
*Judge, &c.*

Filed 4th day of June, 1869, at 6 o'clock p. m.

E. C. V. BLAKE, *Clerk.*

21 UNITED STATES OF AMERICA,
*Middle District of Alabama:*

I, E. C. V. Blake, clerk of the district court of the United States for the middle district of Alabama, hereby certify that the foregoing pages, numbered respectfully from one to 20, inclusive, contain a true, correct, and complete transcript of the record of all the papers, exhibits, depositions, and other proceedings in the case of Murray F. Smith, against William C. Ray, as the same appear of record and on file in my office as

such clerk. And I further certify that the original writ of error, the citation with its service endorsed thereon, and a copy of the bond are appended to this return.

In testimony whereof I have hereunto set my hand and caused the seal of said district court to be affixed at Montgomery, this 25th day of November, A. D. 1871, and of the independence of the United States the 95th year.

[SEAL.] E. C. V. BLAKE,
*Clerk United States District Court Middle District of Alabama.*

22 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judge of the district court of the United States for the middle district of Alabama, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said district court before you, between Murray F. Smith and William C. Ray, a manifest error hath happened to the great damage of the said William C. Ray, as by his complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday in December next, in the Supreme Court, to be then and there held, that,
23 the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 27th day of May, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.] E. C. V. BLAKE,
*Clerk U. S. Dist. Court, Mid. Dist. of Alabama.*

Allowed, May 27th, A. D. 1871.

RICHARD BUSTEED,
*U. S. District Judge for the State of Alabama.*

Filed May 27th, 1871.

E. C. V. BLAKE, *Clerk.*

24 Supreme Court of the United States.

MURRAY F. SMITH
*vs.*
WILLIAM C. RAY.

Know all men by these presents that we, William C. Ray, George B. Holmes, and Albert Strassburger, are held and firmly bound unto Murray F. Smith in the sum of two hundred and fifty dollars, to be paid to his *his* executors or administrators; for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators,

jointly and severally, firmly by these presents, sealed with our seals, and dated this 27th day of May, A. D. 1871.

Whereas the above-bound William C. Ray hath prosecuted a writ of error to the Supreme Court of the United States to recover a judgment rendered in the above-entitled suit by the district court of the United States at the May term, 1869, in favor of the said Murray F. Smith against said William C. Ray:

Now, therefore, the condition of the above obligation is such, that if the above-named William C. Ray shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his *his* plea, then this obligation shall be void; otherwise remain in full force and virtue.

WILLIAM. C. RAY. [SEAL.]
ALBERT STRASSBURGER. [SEAL.]
GEO. B. HOLMES. [SEAL.]

Sealed and delivered in the presence of—

I approve of the above bond as to its form and sufficiency.

RICHARD BUSTEED,
*United States District Judge for the State of Alabama.*

25 Filed May 27th, 1871.

E. C. V. BLAKE.

UNITED STATES OF AMERICA,
*Middle District of Alabama:*

I, E. C. V. Blake, clerk of the district court of the United States for the middle district of Alabama, hereby certify that the foregoing is a full, true, and correct copy of the original bond for costs of appeal in the case of Murray F. Smith vs. William C. Ray, as the same appears on file and of record in my office as such clerk.

Witness my hand and the seal of said district court at Montgomery, this 25th day of November, A. D. 1871.

[SEAL.] E. C. V. BLAKE,
*Clerk U. S. District Court, Middle District of Alabama.*

26 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To MURRAY F. SMITH, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the middle district of Alabama, wherein William C. Ray is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States this 27th day of May, in the year of our Lord 1871.

[SEAL.] RICHARD BUSTEED,
*U. S. District Judge for the State of Alabama.*

27 United States district court, middle district of Alabama, ss:

WILLIAM C. RAY, APPELLANT,
*vs.*
MURRAY F. SMITH, APPELLEE.

I, Robert W. Healy, U. S. marshal for said district, hereby certify that, on the 25th day of November, A. D. 1871, I served on John A. Elmore, esquire, attorney for said Murray F. Smith, the above-named appellee, a copy of the citation in this cause, by delivering said copy to said attorney personally at Montgomery in said district.

R. W. HEALY,
*U. S. Marshal.*

(Indorsement on cover:) No. 471. William C. Ray, plaintiff in error, vs. Murray F. Smith. M. Alabama D. C. U. S. Filed 4th December, 1871

IN THE

# Supreme Court of the United States.

DECEMBER TERM, 1873.

No. 42.

## WILLIAM C. RAY,
## Plaintiff in Error,

VS.

## MURRAY F. SMITH,
## Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

**Brief of the Plaintiff in Error.**

R. T. MERRICK,
OF COUNSEL.

WASHINGTON, D. C.
W. H. MOORE, PRINTER, 511 ELEVENTH STREET.
1873.

# Supreme Court of the United States.

DECEMBER TERM, 1873.

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WILLIAM C. RAY, *Plaintiff in error,*

*vs.*

MURRAY F. SMITH, *Defendant in error.*

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

## *Brief of the Plaintiff in Error.*

This was an action upon two promissory notes, executed on the 12th day of April, 1861, by one S. G. Hardaway, payable at the Bank of Mobile on the 1st day of March, 1862, and on the 1st day of November, 1862, respectively, to W. C. Ray, the plaintiff in error, and by him indorsed to the defendant in error. The suit was brought by the indorsee against the indorser, and judgment was rendered in the Court below, under the instructions of the judge, in favor of the plaintiff Smith, the defendant in error.

The facts, as they appear from the records of the testimony in the case, are: That Hardaway and Ray had been partners in the cotton brokerage business at Montgomery, Alabama, were such partners at the date of the execution of the notes, and continued to be partners until the time of their maturity and for some time afterwards; that, as such partners, they became indebted to Smith; that Ray paid his half of the indebtedness in cash, and Hardaway, being unable so to do, gave the notes in question, indorsed by Ray, which Smith accepted in settlement of the amount, payable by Hardaway; that Smith went to New York at

the breaking out of the war and continued to reside there, while Hardaway and Ray continued to reside at Montgomery during the war, and were and continued to be such residents during the whole time intervening between the execution of the notes and the institution of this suit; that Smith was fully aware of their place of residence during all that time; that intercommunication between the city of New York and the cities of Montgomery and Mobile, which had been interrupted by the civil war, as well as between all other parts of the South and of the whole Union, was resumed and re-established from and after June, 1865; that the notes in question were on the 24th day of August, 1865, forwarded by Smith from New York to one John Whiting, at Montgomery, to be presented for payment; that they were not presented to Hardaway and payment was not demanded of him until the spring of 1866; that no demand was made of the indorser and no notice of the presentation of the notes for payment was given to him before June or July, 1866; and that the notes were never at any time presented for payment at the Bank of Mobile, where they had been made payable.

The only excuse alleged in the pleadings for the failure on the part of the holder of the notes to give due notice of protest to the indorser, as required by the law regulating commercial paper, is the pendency of the civil war. But on the trial, as a further excuse, it was sought to be shown that, before the maturity of the notes, the plaintiff in error, Ray, had in his hands funds of his partner, Hardaway, applicable to the payment of the notes, but which funds, being Hardaway's share of the partnership profits, Hardaway subsequently, and before any demand was made upon him by Smith, had directed Ray to apply to the satisfaction of other demands against Hardaway. The validity of these excuses and the admission by the judge holding the Court below of the deposition of Smith himself taken *ex parte* as evidence on his own behalf, constitute the chief points of controversy.

## I.

### AS TO THE VALIDITY OF THE EXCUSES FOR FAILURE TO GIVE DUE NOTICE OF PROTEST.

1. It will be taken for granted, as too clear for argument, that no sufficient notice of protest was given in this case, and that consequently the indorser was by the commercial law discharged from all liability on account of the notes, unless one or other of the excuses set up by the defendant in error is sufficient to bring him within some of the recognized exceptions to the obligations of that law.

It is in proof that the war was actually at an end in and before the month of June, 1865, and that from and after that time communication was completely restored between New York and Mobile, between New York and Montgomery, and between Montgomery and Mobile. It is also shown by the testimony of Smith himself that the notes were forwarded to Montgomery in August, 1865. Now, a delay from that time until the spring of 1866 to present them for payment, and the further delay until June or July of that year to notify the indorser of their dishonor, seem to be utterly inexcusable and unjustifiable under the circumstances. From August, 1865, until July, 1866, the notes were in the hands of Whiting, Smith's agent at Montgomery; and both Ray and Hardaway were residents of the same city. The authorities are clear that, under such circumstances, notice of protest should have been given to the indorser within twenty-four hours, or some good cause shown for the omission. No cause whatever is shown in this instance. See the authorities on this point quoted in Parsons on Notes and Bills, vol. 1, chap. 12, sec. 6.

Even it it be alleged that there was no *legal* termination of the war in Alabama until the issue of the President's Proclamation of April 2, 1866, yet the delay even then was wholly unauthorized and inexcusable, having extended to the period of three months and more. But it is suggested

that as the notes were in the hands of an authorized agent of Smith, and payment might have been lawfully made to him at any time after August, 1865, this case will be governed by the principle laid down in the case of *Ward vs. Smith* in this Court, and demand should have been made and notice promptly given according to the ordinary rules and usages of commercial paper.

Ward *vs.* Smith, 7 Wallace, 447.
Conn *vs.* Penn, 1 Peters, c. c. 496.
Denniston *vs.* Imbrie, 3 Washington, c. c. 396.

Where the debt is the debt of the maker of the note, as in this instance, it is the right of the endorser that demand should be punctually made on the maker in accordance with the tenor of the note, and notice of dishonor promptly given to him. It is conceded that no demand was ever made at the Bank of Mobile. Such a demand was necessary as a prerequisite to charge the indorser.

Watkins *vs.* Crouch, 5 Leigh, 522.
United States *vs.* Smith, 11 Wheaton, 171.
Wallace *vs.* McConnell, 13 Peters, 137.
Roberts *vs.* Mason, 1 Alabama, 373.
Rowe *vs.* Young, 2 Broderip & Bingham, 165.
Hartwell *vs.* Candler, 5 Blackford, 215.
Montgomery *vs.* Elliott, 6 Alabama, 701.

As the pendency of the war only excused delay in making a demand of payment, and as that difficulty was removed in June, 1865, or at all events on the 2d of April, 1866, it immediately became the duty of the holder to present these notes and give notice of their dishonor forthwith. The existence of the impediment only excused the delay, and did not dispense with the necessity of demand and notice.

Parsons on Notes and Bills, vol. 1, ch. 13, sec. 13.
Beale *vs.* Parish, 20 N. Y., 407.
Chitty on Bills, 493.

Hopkirk *vs.* Page, 2 Brockenbrough, 20.
Mohawk Bank *vs.* Broderick, 10 Wendell, 304.
House *vs.* Adams, 40 Penn., 261.
Apperson *vs.* Union Bank, 4 Coldwell, (Tenn.,) 445.

If the delay in the matter of demand and notice was therefore sufficient to discharge the indorser, unless some other cause existed to excuse such failure, what else is there in the case to justify the holder of the notes? Only the fact that, at the time of the maturity of the notes in 1862, Ray had in his hands, as the active partner of the firm of Hardaway and Ray, funds sufficient to pay them and which he was authorized to apply to their payment, but which subsequently and before the demand in 1866 Ray was directed by Hardaway to apply to some other of Hardaway's debts. It is conceded that Ray had no such funds at the time of the execution of the notes, or at the time of the demand on Hardaway in the spring of 1866, or at the time of the notice to him (Ray) in June or July of 1866, and it is not claimed anywhere that Smith was party to any agreement between Hardaway and Ray as to the application of such funds to the satisfaction of Smith's claim, or was in any way cognizant of such agreement, or looked to such funds for the payment of the notes. And the very fact that an indorser may hold such security for his own indemnity may be justly considered as one of the reasons of the rule of law requiring prompt demand and notice of protest, so that the indorser may protect himself, if possible. No indorser would be justified in holding funds of his principal for an indefinite period of time to secure himself against loss, and consequently the law will not allow any indorser or holder of a note or other negotiable paper to delay the protest of it at his pleasure.

These notes, though by their terms payable in 1862, could not legally be paid before the termination of the war in 1865 or 1866; and, though Ray had funds of Hardaway in 1862, it is not shown that he had any in 1865 or 1866.

Even if, in 1866, Ray had funds specially applicable to the payment of the notes, and Hardaway before the end of the war chose to countermand this application and demand the surrender of the funds or their application to other purposes, as he did in this instance, Ray could not refuse compliance without incurring liability, and consequently was entitled to the usual notice of protest so as to protect himself in the usual manner. As the contract between the maker, indorser, and holder of a note is that the holder will first look to the maker for payment, and hold the indorser liable only on the failure or refusal of the maker, it is difficult to see how, in any case whatever, since there cannot be any failure or refusal without demand, the holder can be justified in omitting such demand and notice thereof to the indorser, unless there has been some concurrent action of the maker and indorser amounting to a virtual waiver of demand and notice. It has been decided that the maker's insolvency does not amount to such waiver.

Nicholson *vs.* Gouthit, 2 H. Blackstone, 609.
Esdaile *vs.* Sowerby, 11 East., 114.
Jackson *vs.* Richards, 2 Caines, 343.
Barton *vs.* Baker, 1 Sergeant & Rawle, 334.
Watkins *vs.* Crouch, 5 Leigh, 522.
Armstrong *vs.* Thruston, 11 Md., 148.

Neither does death, absence, or imprisonment of the maker, or the taking of indemnity, dispense with the rule.

Chitty on Bills and Notes, p. 330, 450.
Spencer *vs.* Harvey, 17 Wendell, 489.
Juniata Bank *vs.* Hale, 16 Serg. & Rawle, 157.
Gibbs *vs.* Cannon, 9 Serg. & Rawle, 201.

The only excuse, for which there is any warrant in reason or in the adjudged cases, is where the indorser has received from the maker funds sufficient for the payment of the note and has been authorized to apply such funds to the discharge of it, and holds the funds at the maturity

of the note. And the reason of this is that the indorser, under such circumstances, can suffer no injury; whereas, in all other cases, he is liable to injury. Wherever injury might result to the indorser, demand and notice are essential, and cannot be omitted. But wherever it becomes the duty of the indorser to stand in the place of the maker and take up the note at maturity, then no notice to him is requisite, because he can have no recourse to the maker.

Kramer *vs.* Sandford, 4 Watts & Sergeant, 328.
Seacord *vs.* Miller, 13 N. Y., 55.
Brown *vs.* Maffey, 15 East., 222.
Bond *vs.* Farnham, 5 Mass., 173.
Gough *vs.* Staats, 13 Wendell, 549.
Mohawk Bank *vs.* Broderick, 10 Wendell, 304.

In the case cited of *Gould* vs. *Staats*, (13 *Wendell*, 549,) Sutherland, justice, says: "Upon the question of due diligence to charge an indorser, whether he has been prejudiced or not by the delay, is perfectly immaterial. It is not to be inquired into. The law presumes he has been prejudiced."

The funds which Ray had in his hands in 1862 were partnership funds, and it was incumbent on the plaintiff below to show that such funds were not subject to partnership claims, and were not finally paid in satisfaction of partnership debts, or that there was no legal obligation on Ray to part with them. *Non constat* that he was not compelled to part with them. Unless it can be shown that the holder or the indorser had a specific lien on these funds for the payment of these notes, the maker, Hardaway, retained entire control of them, and could dispose of them as he pleased, and could require Ray to dispose of them at any time before demand and notice. Now, the holder of the notes certainly had no lien on the funds, because the arrangement by which Ray held the funds was entirely without the holder's knowledge or consent, did not enter into his contract, and he did not look to it for payment. Did Ray have any lien on the funds? His lien, if any, could

only operate by way of indemnity, and could arise only from his obligation to turn the funds over to the holder, and his liability to be held accountable by the holder in a suit for money had and received to his use. But such liability could not arise, if at all, until the maturity of the notes. To constitute a lien of this kind in favor of the creditor, there must be a special appropriation of certain designated funds for a debt matured and fully due. "Nothing can be more clear," says Vice-Chancellor Wigram, "than that instructions communicated by a principal to his own agent to apply the property of the principal in payment of a particular creditor, do not *per se* give that creditor any lien upon the property in the hands of the agent. I think it equally clear that the mere announcement by a principal, even to his creditor, that such an arrangement had been made by himself for the payment of the creditor's debt would not alter the case, nor give the creditor a a lien. It is clear that, notwithstanding such direction or communication, the property may remain under the dominion of the debtor."

Malcolm *vs.* Scott, 3 Hare, 39, 46, 52.
Hosak *vs.* Rogers, 18 Wendell, 319.
Mandeville *vs.* Welch, 5 Wheaton, 277.

## II.

### AS TO THE ADMISSIBILITY OF THE EX PARTE DEPOSITION OF SMITH ON HIS OWN BEHALF.

The Court below, in its refusal to suppress this deposition and in allowing it to be read in evidence, erred on two grounds: 1st. Because the deposition was not taken and returned in conformity with the Judiciary Act under which it is pretended to have been taken; 2d. Because the Judiciary Act did not contemplate the use of the deposition of a plaintiff or party to a suit in any event.

1. All depositions are in derogation of the common law; *ex parte* depositions are especially so; *ex parte* depositions

of parties to a suit are of so extraordinary a character that they cannot be too closely scrutinized or too narrowly restricted. The provisions of the act of 1789, allowing such depositions, should never be resorted to unless in circumstances of absolute necessity, or in certain special cases where the object of the deposition is merely the formal proof of some isolated fact, date, or instrument of writing. For it is the inalienable privilege of parties under our common law to be confronted with the witnesses against them, especially when their opponents become such witnesses, and to have the advantage of cross-examination.

Walsh *vs.* Rogers, 13 Howard, p. 286.
Bell *vs.* Morrison, 1 Peters, 351.
Harris *vs.* Wall, 7 Howard, 704.

The Courts consequently have insisted invariably on the strictest compliance with all the requirements of the act. Among these requirements is one directing that the deposition, when taken, should be sealed up and *directed to the Court* in which it is to be used. A direction to *the clerk of the Court*, or to an individual by a wrong name, as in this instance, styling him clerk of the court, is not sufficient.

Act of Congress of Sept. 24, 1789, 1 Stat. 88, sec. 30.
Jones *vs.* Neale, Martin, (N. C.,) 81, cited in Brightly's Digest of Laws, vol. 1, p. 263.

2. The only ground on which a deposition taken under the Judiciary Act is allowed to be read in evidence is that by the exercise of due diligence the presence of the witness cannot be procured at the trial. Where his presence could have been procured the deposition will not be permitted to be read.

Pettibone *vs.* Derringer, 4 Wash., c. c. 215.
The Samuel, 1 Wheaton, 16.

Now, the plaintiff or defendant in a common law suit is always presumed by law to be present in court. It is the business of the plaintiff to be present to prosecute his suit;

and something more will be required to excuse his absence than mere residence out of the jurisdiction which he has voluntarily selected for the decision of his case. He is under no obligation to become a witness on his own behalf; it is simply his privilege. The witnesses, whose testimony is contemplated under the thirtieth section of the Judiciary Act, are those whose presence at the trial the plaintiff (or the defendant, as the case may be) cannot compel. It cannot be said, under any state of facts, that he cannot legally procure his own presence there. Another consideration is that, whereas in the view of the framers of the Judiciary Act there may be various reasons demanding urgent action in taking the *ex parte* deposition of a witness, and therefore justifying the omission of notice to the adverse party, there can be no condition of things to excuse the omission of notice when it is sought to take the deposition of a party to the cause as a witness.

The third section of the act of Congress of July 2, 1864, (13 Stat., 351,) by which parties to civil actions were rendered competent as witnesses, only removed the common law disqualification to testify on account of interest, and was not intended to place them on an equality in all cases with other witnesses. Consequently it has been held that the act in question does not repeal the rule of law which estops them from discrediting their own commercial paper. And so in other cases. The same principle should be applied to the circumstances of this suit.

It was not necessary to renew the objection to this deposition when it was offered to be read in evidence. The refusal of the motion to suppress was sufficient to authorize the review of the question here.

*Ex parte* Elston, 25 Alabama, 72.
McGill *vs.* Monette, 37 Alabama, 49.
Douglas *vs.* M. & N. P. R. R. Co., 37 Alabama, 688.

III.

Where there are any facts to be found by the jury, such as the reasonableness of the time of demand and notice, or the fact of the defendant's having funds of the maker in his hands to pay the notes, it is error in the Court to take the case from the jury and to *direct* their verdict for the plaintiff.

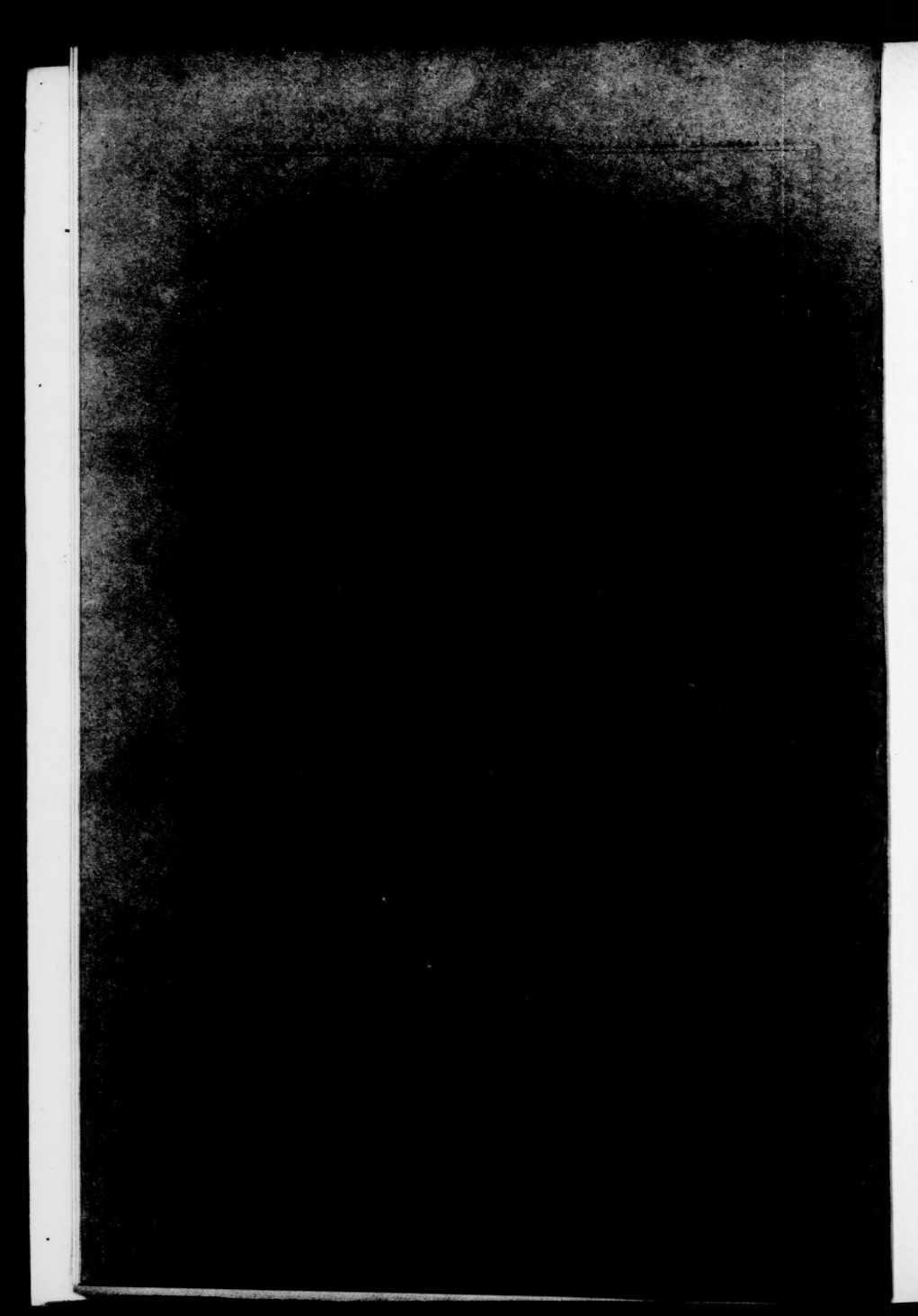
Vasse *vs.* Smith, 6 Cranch, 232.

Union Bank *vs.* Magruder, 7 Peters, 287.

Muilman *vs.* D'Eguino, 2 H. Black, 569.

R. T. MERRICK,

*Of Counsel for Plaintiff in Error.*



# Supreme Court of the United States.

*No. 231.*

W. C. RAY, PLAINTIFF IN ERROR,

*vs.*

MURRAY F. SMITH, DEFENDANT.

This was an action upon two *promissory notes*, executed on the 12th day of April, 1861, by S. G. Hardaway, payable at the Bank of Mobile, to W. C. Ray, and by him endorsed to the defendant in error; one due 1st March, 1862, the other due 1st November, 1862.

The action is by the endorsee against the endorser.

Among the uncontested facts in the case are the following: that the notes were never presented at said bank; that payment was never demanded of the maker until the spring of 1866; that no demand was made upon, or notice given to the endorser until June or July, 1866, and that the residence of the maker and endorser was in the city of Montgomery continuously from the execution of the notes to the commencement of the suit, and was all the while well known to the endorsee; and that intercommunication between all parts of the South and of the Union was re-established and resumed from June, 1865, after the late war.

By the general rule of law the omission to demand payment from the maker when the notes became payable, and to give notice to the endorser that payment had been refused, discharges the endorser.

The endorsee claims that this case is an exception from this general rule; the *onus* is therefore upon him, to establish this claim, both in fact and in law.

French *vs.* Bank of Columbia, 4 Cranch, 141.

The only excuse *alleged in his pleading* for his omission to demand payment of the maker, is the impossibility of making the demand arising out of the late war between the United States and the Confederate States. The settled rule is that impossibility of demanding payment is an excuse, only when such impossibility is permanent. When it is not permanent, (as in this case,) it is only an excuse for a delay until the impossibility is removed.

Beale *vs.* Parish, 20 New York Rep., 407.
1 Parsons on Notes and Bills, 532.

Laches in making the demand is as fatal to the endorsee's right to recover of the endorser as no demand of payment.

Parsons on Notes and Bills, 537, note (m.)

On the trial the endorsee *without any pleading to that effect* was allowed to introduce the testimony of the maker; that endorser had funds of the maker in his hands to pay said notes "*prior to their maturity.*" The time when the endorser had these funds, is not more definitely fixed; but the proof is clear, that at the time of the endorsement, the endorser had no funds of the maker, and that afterwards the funds of the maker which the endorser had, was the mere share of the maker in an unsettled partnership between the maker and endorser; and that as the notes sued on could not be found at their maturity, the endorser had afterwards, and before any demand for payment, paid the said funds to other creditors of the maker under instructions from the maker so to

do; that the said partnership, a share in which constituted the only funds of the maker in the hands of the endorser, was one formed and carried on during the late rebellion, in the rebel country, where the rebel currency was the prevailing currency, which it would have been unlawful to have paid to the endorsee, (then a citizen of New York.)

This evidence certainly did not authorize the district court as a matter of law absolutely to "*direct*" the verdict of the jury for the plaintiff for the entire amount of the notes, and interest thereon; for it is well settled that whenever it appears that want of demand, or laches in making demand, "*may* produce any detriment" to the endorser, then the want of demand, or laches in making demand, discharges him.

Cary *vs.* Scott, 3 B. & Ald., 619.
Parsons on Notes and Bills, 551, note (c.)
French *vs.* Bank of Columbia, 4 Cranch, *supra.*
Taylor *vs.* French, 3 E. D., Smith's Report, 458.
Seacord *vs.* Miller, 3 Kernan's Report, 55.
Spencer *vs.* Harvey, 17 Wend, 489.
Kramer *vs.* Sendford, 4 Watts & Serg., 328.

Upon the material question, whether the want of demand, or laches in making demand, might produce, or did produce, any detriment to the endorser, the district court denied him and his counsel any answer to the several material questions propounded to Hardaway, the maker, whilst under cross-examination as the witness of the endorsee; and also denied the counsel of the endorser the right to make a statement to the court for the purpose of showing the relevancy of the expected answers to those questions.

It looks like a mockery for the law to say to the endorser, you may prove detriment to yourself from want of demand, but you shall have no answer to such questions as you propounded to the maker on cross-examination, although it is

obvious that an affirmative answer to those questions by the maker would clearly have proved such detriment to the endorser.

If the endorser had reasonable ground to expect the note would be paid *by the maker*, (as in this case, where the note was given for the debt of the maker,) he has the right to require a demand upon the maker before he can be held liable, especially when he is the endorser of a *promissory note.*

Insolvency of the maker, "*known at the time of endorsement*," is the only excuse for want of demand in such case.

French *vs.* Bank of Columbia, and other authorities, *supra.*

If it does not appear upon the record that a suit might have been maintained upon said promissory notes in the courts of the United States, between the *original parties* to these promissory notes, no suit can be maintained upon them in those courts by any subsequent holder.

Montalet *vs.* Murray, 4 Cranch, 46.

Construing the second count most strongly against the endorsee, as the law requires, it is plain from its statements that *when the notes were endorsed* to defendant in error he was a citizen of New York, and the endorser, Ray, a citizen of Alabama, then a rebel state at war with the United States, including New York. The endorsement was void by the law which interdicts all dealings, &c., between enemy and enemy.

The charge of the district court is a plain invasion of the province of the jury. To uphold such a charge upon such evidence is not to declare that "the right of trial by jury shall remain inviolate."

It is perfectly clear from all the evidence that there was no impossibility of making demand of the maker, nor even

an obstacle thereto, from June, 1865, the time when intercommunication between all parts of the Union was established and resumed after the late war.

A motion to suppress an entire deposition must be made before entering on the trial.

1 Brichell's Dig., 558, sec. 114–116.

When a motion to suppress a deposition has been made and overruled, any subsequent renewal of such motion is addressed to the sound discretion of the primary court, and its action thereon is not revisable.

Hicks *vs.* Lawson, 39 Ala. Rep., 90.

The only action of the primary court in overruling a motion to suppress a deposition is the action taken on the first motion of that kind which is made. That action cannot be revised by *mandamus*, nor otherwise than by appeal or writ of error after final judgment in the cause. But it is revisable on such appeal or writ of error.

Elston, *ex parte*, 25 Ala. Rep., 72.

Such refusal to suppress a deposition is, at most, error without injury, unless, (as in this case,) the record shows the deposition was actually read in evidence on the trial.

The argument of the defendant in error, that the right to revise the refusal to suppress, was lost, by the failure of the plaintiff in error to object to the deposition when offered in evidence, is entitled to no force, such objection to the deposition would have been nothing more than a rene wal of the motion to suppress; and the action of the court on that renewal would certainly not have been revisable.

Hicks *vs.* Lawson, *supra.*

The law requires no such vain thing; but permits the party to stand upon his exception to the refusal to suppress when the first motion to suppress was made before entering on the trial.

Really an objection to the deposition when offered in evidence, and just after the court had refused to suppress it, would have been disorderly; for unless the deposition was one which the law required to be suppressed *in toto*, there was nothing in the deposition that was not relevant evidence and therefore admissible before the jury.

According to all authorities the deposition should have been suppressed upon the grounds stated in the motion to suppress it; such depositions are not favored, nor tolerated except when *taken, directed, and returned* in strict accordance with the act of Congress.

*Errors Assigned.*

1. The said district court erred in overruling the said motion to suppress the deposition of the said Murray F. Smith, (the defendant in error,) and in refusing to suppress said deposition, as shown by the Bill of Exceptions.

2. That said district court erred in overruling the demurrer to the second count of the declaration or complaint.

3. The said district court erred in overruling the demurrer to the first count of the declaration or complaint.

4. The said district court erred in overruling the objection of plaintiff in error to the offer of defendant in error to prove by the witness, Hardaway, that plaintiff in error had funds of said Hardaway in his hands to pay said notes prior to their maturity, as shown in the Bill of Exceptions.

5. The said district court erred in permitting said Hardaway, against the objection of plaintiff in error, to testify that plaintiff in error had funds of said Hardaway in his hands to pay said notes prior to their maturity, as shown in the Bill of Exceptions.

6. The said district court erred in refusing to permit any answer to be made to the first question propounded by plaintiff in error on cross-examination to said witness, Hardaway, copied in the Bill of Exceptions, as shown in the Bill of Exceptions.

7. The said district court erred in refusing to permit the counsel of plaintiff in error to make any statement to the court for the purpose of showing the relevancy of the matter he expected to elicit as an answer to said question propounded by plaintiff in error to Hardaway, first copied in the Bill of Exceptions, and the connection in which, and the purpose for which he proposed to introduce said matter, and certain other facts which he expected to prove in the course of the trial, in connection with said matter, as shown in the Bill of Exceptions.

1 Greenleaf's Evidence, 12 Edition, section 51, a, and notes thereto.

8. The said district court erred in each refusal to allow any answer to be made to any of said questions propounded by plaintiff in error to said witness, Hardaway, copied in the Bill of Exceptions, or to any part of said questions, as shown in the Bill of Exceptions.

9. The said district court erred in the charge given by it to the jury, and in each part of said charge, as shown by the Bill of Exceptions.

10. The said district court erred in refusing to allow plaintiff in error to state to the court the grounds of said exceptions to said charge, and to each part thereof, and to the matters of law respectively, on account of which he so excepted, as shown in the Bill of Exceptions.

11. The said district court erred as shown in the Bill of Exceptions.

E. W. RICE,
*Of Counsel for Plaintiff in Error.*

W. T. Merrick
Of counsel

# Supreme Court of United States.

WILLIAM C. RAY,
v.
MURRAY F. SMITH.
No. 231.

## Brief of P. PHILLIPS.

This is an action brought by the defendant in error against the plaintiff in error, as indorser of two promissory notes, made by one Hardaway, in his favor, payable in the Bank of Mobile, on the 1st March and the 1st November, 1862, each for $1,124.50.

The defendant in error, at the time the notes fell due, was a citizen of New York, and has so continued ever since. The other parties to the note were, and continue to be, citizens of Alabama.

The notes were not presented for payment at their maturity, by reason of the war, but were presented soon after its close, to wit: on 1st September, 1865, and payment refused.

The declaration, besides the special counts, contains also the usual money counts.

On the 27th May, 1869, there was a verdict and judgment for defendant in error. p. 9. A motion for a new trial having been made and overruled, the present writ of error was sued out.

The case shows that Hardaway, the maker of the note, and Ray, the indorser, were, at the time of the indorse-

ment to Smith, and long subsequently, partners in trade in the city of Montgomery, and that these notes were given to extinguish an indebtedness of the firm to said Smith.

A bill of exceptions was taken, which shows that *some time before* the cause was called for trial, a motion was made to suppress the deposition of Smith, taken before a Notary in New York, under the act of 1789. The objections are to be found at page 14.

This deposition is merely descriptive of the course of business between the parties, out of which the indebtedness arose. The notes were given to settle the account between them on the purchase and sale of cotton.

The motion to suppress the deposition was denied.

Hardaway was called as a witness, and testified, in substance, that the firm had been indebted to Smith over $4,000, and that a settlement had taken place, by which Smith agreed to receive from Ray one-half the amount, and from witness, the notes in question for his half.

The witness further testified that "Ray had funds of his, in his hands, to pay said notes, prior to their maturity." page 17.

On cross-examination he further testified, that Hardaway & Ray were copartners in the cotton brokerage; that, in 1862, he left Montgomery to enter the army, under agreement that he should continue to share equally in the business of the firm; that his profits therein, amounted to a sum much larger than the amount of these notes, at a period earlier than their maturity; and, "that this share was in the defendant's hands until after the maturity of said notes, and the *defendant was authorized to apply the same to the payment of said notes at their maturity.*" But, as at their maturity, the notes could not be found, he subsequently directed

the money to be paid to his other creditors; which was done. Page 18.

The evidence was objected to by Ray, and objection overruled.

Ray then proposed to ask certain questions of the witness to show, that if the notes had been presented to him, at an earlier period after the close of the war, he would have had the means to pay the same, and that he subsequently became disabled. Page 18. These were ruled out.

It was in this stage of the trial the plaintiff offered in evidence the deposition of Smith, but no motion was made to suppress or reject it. Page 19.

Evidence was then introduced by Ray to show when intercourse became practical after the close of the war; then his own deposition was read, in which he substantiated the evidence given by Hardaway, and testified that he had no notice of presentment, until June, 1866.

This is all the evidence in the cause. There is a single instruction given by the judge, at page 19.

The defendant's counsel excepted to the instruction, and desired to state to the court the grounds of the exception, which the court refused to hear, but he asked for no further instructions, but excepted to the refusal of the court to allow him to state the grounds of his exception to the charge as given.

The charge excepted to is as follows: "If there were no evidence in the case that the maker of the notes had provided the indorser with funds to discharge them at maturity, then the question whether the notes were legally presented for payment, and the question whether legal notice of protest was given to the indorser, would have to be submitted to the jury. The evidence on this point is, that Ray was provided by Hardaway with the means of indemnifying himself against his indorsement.

He need not have parted with these means, until the notes were paid and in his possession. He chose however to do so, and cannot now complain of the want of demand on the maker, or notice of protest to himself. I therefore direct your verdict for the plaintiff," &c., &c. p. 19.

There was no contradictory evidence as to the *fact*, on which the charge is given, to wit: that Hardaway had left funds in the hands of the indorser to pay the notes. This was testified to by Hardaway himself and corroborated by Ray. There was, therefore, nothing to be left to the jury.

On this fact arose the question of *law*, to wit: is an indorser discharged for want of notice, when funds had been placed in his hands by the maker for the payment of the note?

That the law was well stated is shown fully by the adjudged cases.

Chilton & Price v. Robbins, 4 Ala., 224.

Stephenson v. Primrose, 8 Port., 163.

Story on Bills, § 316.

Chitty on Bills, marg. p. 441.

Then, as to the refusal to suppress Smith's deposition.

*First.* The record shows that it was taken in compliance with the requisitions of the act.

*Second.* If any defect existed, it should have been objected to when offered in evidence. It is not sufficient that a motion had been made to suppress it sometime before the trial. The objection must be made on the trial, and if not made when offered it will be regarded as waived.

Brown v. Turkinson, 3 Wall., 377.

Lisbon v. Bath, 3 Fost., 1.

*Third.* The evidence of Smith in no wise relates to the matter on which the verdict and judgment rests.

It could not have influenced the jury, for their verdict was rendered under the *direction of the judge*, and that direction was placed on a fact as to which Smith did not testify.

Beevans v. U. S., 8 Wall., 56.

If the charge of the court is illegal of course the judgment would be reversed, but if legal, it will not be reversed, although improper evidence had been admitted, if that evidence in no wise touched the character of the judgment.

Greenleaf v. Birth, 5 Pet., 135.

Gregg v. Moss, 14 Wall., 564.

Another ground of exception is, that the court refused to allow the questions to be asked of Hardaway, the maker, whether if the notes had been presented to him within thirty days after intercourse had been restored, he would have had the means to pay them, and that he had since lost the means.

If the charge given by the court, that Ray the indorser was liable in the action, though no notice had been given to him, then the evidence offered was clearly irrelevant, and was properly excluded.

The last ground of exception is that after the charge was given and the counsel had excepted to it, he offered to state the grounds of his exception, but the judge "refused to allow any such statement."

The duty of the judge was to give the charge; the right of the counsel to except to it. When this was done the law governing such proceedings was fully satisfied. If there was error in the charge, the defendant had secured the means by which it would be corrected. The judge was not bound to hear the statement

of counsel as to his reasons for making the exception. On the other hand the counsel was not bound, after a charge had been given, to state why he excepted.

The sole question, therefore, for adjudication, is whether the charge given is in accordance with law. If it be, the judgment must be affirmed, though the case might have admitted of other questions. It was the duty of the defendant to ask for any charge which the facts of the case would warrant. If he omit to ask for such charges he cannot complain that the court has not given them.

Express Co. v. Kountre, 8 Wall, 343.

Pennock v Dialogue, 2 Pet., 1.

P. PHILLIPS,
*for Defendant in Error.*